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8  
9 **THE UNITED STATES DISTRICT COURT**  
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
11

12 **VINCENT OBIJULU,**

13 **Plaintiff,**

14 **v.**

15 **SAN MATEO PROBATION**  
16 **DEPARTMENT,**

17 **Defendant.**

18 **S CASE NO. C 07-3870 CW**

19 **S**  
20 **S PLAINTIFF'S STATEMENT OF NON-**  
21 **S OPPOSITION TO DEFENDANT'S**  
22 **S MOTION FOR A MORE DEFINITE**  
23 **S STATEMENT, STATEMENT OF NON-**  
24 **S OPPOSITION TO DEFENDANT'S**  
25 **S MOTION TO STRIKE THE PRAYER**  
26 **S FOR PUNITIVE DAMAGES, AND**  
27 **S OPPOSITION TO DEFENDANT'S**  
28 **S MOTION TO STRIKE "TIME-BARRED**  
**S ALLEGATIONS" AND OPPOSITION**  
**S TO DEFENDANT'S MOTION TO**  
**S DISMISS.**

**S**  
**S**  
**S**  
**S Hearing Date: December 13, 2007**

**S Hearing Time: 2:00 p.m.**

**S Courtroom: 2, 4<sup>th</sup> Floor**

**S**  
**S (The Honorable Claudia Wilken)**  
**S**

**TABLE OF CONTENTS**

<b>I.</b>	<b>PLAINTIFF’S STATEMENT OF NON-OPPOSITION TO DEFENDANTS MOTION FOR A MORE DEFINITE STATEMENT</b>	<b>..... - 4 -</b>
<b>II.</b>	<b>PLAINTIFF’S STATEMENT OF NON-OPPOSITION TO DEFENDANT’S MOTION TO STRIKE THE PRAYER FOR PUNITIVE DAMAGES</b>	<b>..... - 4 -</b>
<b>III.</b>	<b>PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO STRIKE “TIME-BARRED ALLEGATIONS.”</b>	<b>..... - 4 -</b>
<b>IV.</b>	<b>PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO DISMISS.</b>	<b>..... - 6 -</b>
	<b>A. The Legal Standard for a 12(b)(6) Motion To Dismiss.</b>	<b>..... - 6 -</b>
	<b>B. Plaintiff’s “Time-Barred Allegations” Bear On His Discrimination Complaints.</b>	<b>..... - 6 -</b>
	<b>C. Plaintiff Pled Sufficient Facts to State A <i>Prima Facie</i> Claim of Discrimination.</b>	<b>..... - 7 -</b>
	<b>D. Plaintiff Pled Sufficient Facts to State a <i>Prima Facia</i> Claim for Retaliation..</b>	<b>..... - 8 -</b>
	<b>E. Plaintiff Received Two “Right-to-sue” Letters from the DFEH...</b>	<b>- 8 -</b>
<b>V.</b>	<b>CONCLUSION.</b>	<b>..... - 9 -</b>

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

<i>Bennett v. Schmidt</i> , 153 F.3d 516, 518 (7th Cir. 1998) . . . . .	- 6 -
<i>Cauchi v. Brown</i> , 51 F.Supp.2d 1014, 1016 (E.D. CA. 1999) . . . . .	- 6 -
<i>Clegg v. Cult Awareness Network</i> , 18 F.3d 752, 754 (9 <sup>th</sup> Cir. 1994) . . . . .	- 6 --8 -
<i>Gilligan v. Jamco Develop. Corp.</i> , 108 F.3d 246, 249 (9th Cir. 1997) . . . . .	- 6 -
<i>Lyons v. England</i> , 307 F.3d 1092, 1109 (9 <sup>th</sup> Cir. 2002) . . . . .	- 5 -, - 7 -
<i>National R.R. Passenger Corp. v. Morgan</i> 536 U.S. 101, 113, 122 S.Ct. 2061, 2072 (2002) . . . . .	- 5 -, - 6 -
<i>United Air Lines, Inc. v. Evans</i> , 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977). .	- 5 -, - 6 -
<i>United States v. Redwood City</i> 640 F.2d 963, 966 (9th Cir. 1981) . . . . .	- 6 -
<i>United States v. White</i> , 893 F.Supp. 1423, 1428 (C.D. CA. 1995) . . . . .	- 6 -

**FEDERAL STATUTES**

Rule 12(b) of the Federal Rules of Civil Procedure . . . . .	- 6 -
Rule 12(e) of the Federal Rules of civil Procedure . . . . .	- 6 -
Rule 12(f) of the Federal Rules of Civil Procedure . . . . .	- 4 -
Rule 403 of the Federal Rules of Evidence . . . . .	- 5 -

**I. PLAINTIFF'S STATEMENT OF NON-OPPOSITION TO DEFENDANT'S MOTION FOR A MORE DEFINITE STATEMENT.**

Plaintiff does not oppose Defendant's motion for a more definite statement. In fact, Plaintiff's counsel offered to stipulate to amend Plaintiff's complaint to address each of the issues raised in Defendant's motion. *See* Declaration of Lawrence J. King ("King Decl."). Defendant's counsel rejected Plaintiff's offer, first insisting that Plaintiff's counsel provide Defendant's counsel a copy of the stipulation, then insisting that Plaintiff's counsel provide Defendant's counsel a copy of the proposed amended complaint, and, finally, insisting that this matter be decided by the Court.

Concurrent with this pleading, Plaintiff is filing a Motion To Amend that provides the clarification that Defendant requested and addresses each of the other issues raised in Defendant's motion for which this Court could possibly provide relief. The amended complaint:

1. Alleges specific incidents of discrimination and retaliation in 2005 and 2006 (i.e. within the requisite statute of limitations period);
2. Alleges the requisite jurisdictional facts in support of Plaintiff's California Fair Employment & Housing Act ("FEHA") claims (i.e. that he filed two FEHA charges and received "right-to-sue" letters concerning each);
3. Eliminates the claim for gender discrimination; and
4. Eliminates the prayer for punitive damages.

**II. PLAINTIFF'S STATEMENT OF NON-OPPOSITION TO DEFENDANT'S MOTION TO STRIKE THE PRAYER FOR PUNITIVE DAMAGES.**

Plaintiff does not oppose Defendant's motion to strike the prayer for punitive damages. Concurrent with this pleading, Plaintiff is filing a Motion To Amend, with a proposed amended complaint that eliminates the prayer for punitive damages.

**III. PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO STRIKE "TIME-BARRED ALLEGATIONS."**

Defendant asks this Court to strike "the time-barred allegations in the complaint." *See e.g.* Def's Mot. 1:8-9. However, as Defendant admits in its motion, Rule 12(f) only permits the Court to strike "redundant, impertinent or scandalous matter" which "could have no possible bearing on

1 the subject matter of the litigation.” Def’s Mot5:23-26. The “time-barred” allegations of  
 2 discrimination and retaliation in this case clearly are not “redundant, impertinent or scandalous.”  
 3 Moreover, they clearly have bearing on the subject of this litigation.

4 As the United States Supreme Court noted in *National R.R. Passenger Corp. v. Morgan* 536  
 5 U.S. 101, 113, 122 S.Ct. 2061, 2072 (2002) an employee may use the prior time-barred acts of  
 6 discrimination as background evidence in support of a timely claim. The Ninth Circuit Court of  
 7 Appeals, in turn, explained that “the *Evans* majority<sup>1</sup> indicated that a discriminatory act for which  
 8 the employer's liability is time-barred “may constitute relevant background evidence in a proceeding  
 9 in which the status of a current practice is at issue.” *Lyons v. England*, 307 F.3d 1092, 1109 (9<sup>th</sup> Cir.  
 10 2002). The *Lyons* court then went on to examine what standard should govern the admissibility of  
 11 prior acts of discrimination in a case such as this. *Id* at 1110-1113. As part of its analysis, the *Lyons*  
 12 court pointed out that, in the context of a race-based failure-to-promote claim, evidence occurring  
 13 outside the limitations period that the employer had rejected, on the basis of race, candidates for  
 14 promotion is probative of the employer's discriminatory intent. *Id* at 1111, fn. 12. Likewise, the  
 15 *Lyons* court noted that, in the context of a race-based failure-to-promote claim, evidence occurring  
 16 outside the limitations period that the employer or its agent made a single derogatory racial remark  
 17 to the plaintiff may be admitted as relevant evidence of the employer's present discriminatory intent.  
 18 *Id* at 1111, fn. 12.

19 While this Court eventually may “be required to engage in a *Rule 403* balancing” to  
 20 determine “the admissibility of evidence of time-barred acts,” *Id* at 1111, it would be inappropriate  
 21 for this Court to strike Plaintiff’s allegations of prior incidents of discrimination at this stage of the  
 22 pleadings.

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26 <sup>1</sup> *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977).

**IV. PLAINTIFF'S OPPOSITION TO  
DEFENDANT'S MOTION TO DISMISS.**

**A. The Legal Standard for a 12(b)(6) Motion To Dismiss.**

As Defendant acknowledges, a Rule 12(b) motion based upon a failure to alleges facts upon which relief may be granted, may only be granted if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Def's Mot. at 5:4-6, citing *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9<sup>th</sup> Cir. 1994). Moreover, "all allegations of material fact must be taken as true and construed in the light most favorable to the nonmoving party." Def's Mot. at 5:2-4, also citing *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9<sup>th</sup> Cir. 1994).

What Defendant fails to inform this Court is that a Rule 12(b)(6) motion for failure to state a claim "is viewed with disfavor and is rarely granted." *Gilligan v. Jamco Develop. Corp.*, 108 F.3d 246, 249 (9<sup>th</sup> Cir. 1997)(emphasis added; internal quotes omitted). A 12(b)(6) dismissal is proper only in "extraordinary" cases. *United States v. Redwood City* 640 F.2d 963, 966 (9<sup>th</sup> Cir. 1981); *Cauchi v. Brown*, 51 F.Supp.2d 1014, 1016 (E.D. CA. 1999); *United States v. White*, 893 F.Supp. 1423, 1428 (C.D. CA. 1995) Moreover, there is no justification for Defendant pursuing its motion after Plaintiff offered to amend the complaint to address the deficiencies that Defendant asserted in its motion. *Bennett v. Schmidt*, 153 F.3d 516, 518 (7<sup>th</sup> Cir. 1998) ("Instead of lavishing attention on the complaint until the plaintiff gets it just right, a district court should keep the case moving" by requiring a more definite statement under Rule 12(e).).

**B. Plaintiff's "Time-Barred Allegations" Bear On His Discrimination Complaints.**

In the instant case, Plaintiff alleged that he was discriminated against as early as 2001 and as late as 2007. Admittedly, a number of the specific instances of discrimination identified in Plaintiff's original complaint occurred outside the relevant statute of limitations period. However, as discussed above, evidence of these "time-barred" incidents are nonetheless admissible to support Plaintiff's timely discrimination complaints. *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977); *National R.R. Passenger Corp. v. Morgan* 536 U.S. 101, 113, 122

1 S.Ct. 2061, 2072 (2002); *Lyons v. England*, 307 F.3d 1092, 1109 (9<sup>th</sup> Cir. 2002).

2 **C. Plaintiff Pled Sufficient Facts to State A *Prima Facie* Claim of Discrimination.**

3 In his original complaint, Plaintiff listed a number of promotion decision for which he was  
4 not given equal consideration because of his national origin and because he complained about the  
5 discrimination to which he was being subjected. *See e.g.* Complaint ¶ 12. Admittedly, the original  
6 complaint did not make clear when these promotions took place. However, when **considered in the**  
7 **light most favorable to Plaintiff**, it can not be said that **“it appears beyond doubt that the**  
8 **plaintiff can prove no set of facts in support of his claim that would entitle him to relief.”**  
9 *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9<sup>th</sup> Cir. 1994). In the course of normal  
10 discovery, Plaintiff would be able to establish (1) the dates of the promotions, a number of which  
11 occurred within the relevant limitations period, (2) that Plaintiff was the most qualified candidate,  
12 and (3) that those selected were not within Plaintiff’s protected class.

13 Moreover, Plaintiff’s proposed amended complaint identifies a number of promotions within  
14 the relevant limitations period for which he was the most experienced and qualified candidate, but  
15 for which he was not selected. Instead, he makes clear in his proposed amended complaint, less  
16 qualified candidates who were not within his protected class were selected or, in some cases, the  
17 positions were left vacant. *See* Amended Complaint ¶¶ 12, 23 & 25.

18 Finally, Defendant admits that Plaintiff identified four positions in his original complaint  
19 during the relevant limitations period which he alleges he was denied due to discrimination and  
20 retaliation. *See* Complaint ¶ 25. Defendant asserts that Plaintiff’s claims concerning these positions  
21 should be dismissed because Plaintiff “does not allege that the positions he applied for went to a  
22 member outside the protected class.” Def’s Mot. 8:4-9. Once again, the fact that those selected were  
23 not members of Plaintiff’s protected class would be established during normal discovery.  
24 Accordingly, when **considered in the light most favorable to Plaintiff**, it can not be said that **“it**  
25 **appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that**  
26 **would entitle him to relief.”** *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9<sup>th</sup> Cir. 1994).

Moreover, Plaintiff addresses this alleged deficiency in his Amended Complaint. *See* Amended Complaint ¶ 24.

**D. Plaintiff Pled Sufficient Facts to State a *Prima Facie* Claim for Retaliation..**

In his original complaint, Plaintiff alleged that Ms. Calhoun began putting negative material into his personnel file in retaliation for his complaints, after he complained in November, 2004, about the discrimination to which he was being subjected. *See* Complaint ¶ 15. Plaintiff also alleged that after he filed his original EEOC charge, he was subjected to continuing discrimination and retaliation, including being denied four (4) positions for which he was qualified. When **considered in the light most favorable to Plaintiff**, it can not be said that **“it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.”** *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9<sup>th</sup> Cir. 1994). In the course of normal discovery, the specific incidents of the continuing discrimination and retaliation about which Plaintiff complains would be identified. Moreover, Plaintiff provides clarification concerning the retaliation to which he was subjected in his proposed amended complaint. *See* Amended Complaint ¶¶ 14 & 23.

**E. Plaintiff Received Two “Right-to-sue” Letters from the DFEH.**

Defendant requests that this Court dismiss Plaintiff state law discrimination and retaliation claims on the ground that he failed to obtain “right-to-sue” letters from the California Department of Fair Employment & Housing (“DFEH”). *See* Def. Mot. 9:5-10:4. Defendant knew better. It was sent the same “NOTICE TO COMPLAINANT AND RESPONDENT” that Plaintiff received on or about January 11, 2006 and June 19, 2007, which were the DFEH “right-to-sue” letters concerning Plaintiff original and second discrimination and retaliation claims filed with that agency.. King Decl. Exh. 2. Moreover, a simple phone call to Plaintiff’s counsel or a request for a production of those letters would have obviated the need for this Court to waste judicial resources on this issue. Finally, Plaintiff specifically alleges that he received the requisite DFEH “right-to-sue” letters in his proposed amended complaint. *See* Amended Complaint ¶¶ 22 & 25.



**V. CONCLUSION.**

For the reasons set forth above, Plaintiff respectfully requests that this Court grant Defendant's motion for a more definitive statement and deny Defendant's motion to strike and to dismiss.

**Dated: November 20, 2007**

**LAW OFFICES OF LAWRENCE J. KING**

**By: S/Lawrence J. King  
Lawrence J. King  
ATTORNEY FOR PLAINTIFF**

**LAWRENCE J. KING (CSB #120805)**  
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**ATTORNEY FOR PLAINTIFF**  
**VAN A. PENA, PHD., M.D.**

**THE UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**VINCENT OBIAJULU,**

**Plaintiff,**

**v.**

**SAN MATEO PROBATION**  
**DEPARTMENT,**

**Defendant.**

**S CASE NO. C 07-3870 CW**

**S**

**S DECLARATION OF LAWRENCE J.**  
**S KING IN SUPPORT OF PLAINTIFF'S**  
**S STATEMENT OF NON-OPPOSITION**  
**S TO DEFENDANT'S MOTION FOR A**  
**S MORE DEFINITE STATEMENT,**  
**S STATEMENT OF NON-OPPOSITION**  
**S TO DEFENDANT'S MOTION TO**  
**S STRIKE THE PRAYER FOR PUNITIVE**  
**S DAMAGES, AND OPPOSITION TO**  
**S DEFENDANT'S MOTION TO STRIKE**  
**S "TIME-BARRED ALLEGATIONS"**  
**S AND OPPOSITION TO DEFENDANT'S**  
**S MOTION TO DISMISS.**

**S**

**S Hearing Date: December 13, 2007**

**S Hearing Time: 2:00 p.m.**

**S Courtroom: 2, 4<sup>th</sup> Floor**

**S**

**S (The Honorable Claudia Wilken)**

**S**

**S**

I, Lawrence J. King, declare as follows:

1. I am Plaintiff Vincent Obiajulu's attorney of record in this case and I have personal knowledge of the matters to which I declare herein and would be able to testify to the same if called to do so before this Court.

2. Attached hereto as Exhibit 1 are true and correct copies of the emails that confirm correspondence between myself and opposing counsel concerning Defendant's current motion.

1           3.       Attached hereto are as Exhibit 2 are true and correct copies of the January 26, 2007  
2 and the June 19, 2007, DFEH "right-to-sue" letters.

3           I declare under penalty of perjury under the laws of the State of California that the foregoing  
4 is true and correct.

5           DATED:       November 20, 2007                               s/ Lawrence J. King  
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EXHIBIT 1A

Date: Wed, 14 Nov 2007 11:26:21 -0800 (PST)  
From: "Lawrence King" <kingesq@pacbell.net>  
Subject: Obiajulu v. San Mateo County  
To: rswope@co.sanmateo.ca.us

Raymond:

Attached is the stipulation that we discussed. Please review and let me know if you have any questions or proposed changes. If you and your client agree, I will e-file it with the Court once you let me know that it is ok to do so.

Thanks.

Larry

EXHIBIT 1B

Date: Thu, 15 Nov 2007 16:13:37 -0800 (PST)  
From: "Lawrence King" <kingesq@pacbell.net>  
Subject: Obiajulu v. San Mateo County  
To: "Claire Cunningham" <Ccunningham@co.sanmateo.ca.us>

Claire:

Attached is the First Amended Complaint. I believe it address the points raised in your motion. For instance,

1. it sets forth specific instances of discrimination and retaliation occurring in the relevant time period;
2. it sets forth that my client received "right-to-sue" letters from the DFEH concerning both of his charges;
3. it eliminates any claim for gender discrimination; and
4. it eliminates the request for punitive damages.

Please let me know by the end of the business day tomorrow whether or not you are willing to withdraw your motion in light of the amended complaint.

Thanks.

Larry King

Claire Cunningham <CCunningham@co.sanmateo.ca.us> wrote:

Dear Mr. King:

This will confirm our telephone conversation this morning in which I explained that we cannot agree to your proposed stipulation without reviewing the amended complaint. If your amended complaint adequately addresses the issues raised in our motion to dismiss/strike, we would agree to withdraw our motion, but it isn't possible for us to make that decision without first reviewing the amended complaint. Please feel free to contact me if you have any further questions.

Very truly yours,

Claire Cunningham  
Deputy County Counsel  
Telephone: (650) 363-4795  
ccunningham@co.sanmateo.ca.us

EXHIBIT 1C

Date: Fri, 16 Nov 2007 14:20:34 -0800  
From: "Claire Cunningham" <CCunningham@co.sanmateo.ca.us>  
To: "Lawrence King" <kingsq@pacbell.net>  
CC: "Raymond Swope" <RSwope@co.sanmateo.ca.us>  
Subject: Obiajulu v. San Mateo County

Larry:

While we appreciate your decision to eliminate the improper gender-related claims and the request for punitive damages, the draft amended complaint fails to remedy the other deficiencies set forth in our motion to dismiss/strike. Most notably, you did not delete the time-barred allegations or allege facts sufficient to state causes of action against the County under either Title VII or the FEHA. Consequently, we cannot agree to your proposed stipulation and will await the court's decision on our motion.

Best regards,

Claire A. Cunningham  
Deputy County Counsel  
Telephone: (650) 363-4795  
ccunningham@co.sanmateo.ca.us

EXHIBIT 2

[Hard copies of the January 26, 2007 and the June 19, 2007, DFEH  
“right-to-sue” letters are attached to the Court’s courtesy copy]